STATE OF MICHIGAN

IN THE SUPREME COURT

(ON APPEAL FROM THE COURT OF APPEALS)

ALICE M. BROWN,

Plaintiff-Appellee,

v

CITY OF SAULT STE. MARIE, a Michigan municipal corporation, ERIC FOUNTAIN, GREG SCHMITIGAL, MIKE BREAKIE, JEFF KILLIPS and BRUCE LIPPONEN,

Defendants-Appellants. /

S. Ct. No. 154851

MCOA No. 330508

L.C. No. 14-13459-NO

DEFENDANTS-APPELLANTS' SUPPLEMENTAL BRIEF IN SUPPORT OF APPLICATION FOR LEAVE TO APPEAL

PROOF OF SERVICE

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TABLE OF CONTENTS

Page(s)

INDEX OF AUTHORITIES

Page(s)

Cases

Statutes

STATEMENT OF THE SUPPLEMENTAL QUESTION PRESENTED

Whether the Court of Appeals erred in concluding that Plaintiff's notice, "when read as a whole," satisfied the notice requirement of MCL 691.1404(1) ("the notice shall specify…the injury sustained") because the notice "referenced documents" that allegedly more fully described Plaintiff's injuries, where under the straightforward application of fundamental principles of statutory construction to the clear and unambiguous language of MCL 691.1404(1), Plaintiff's notice failed to comply with the statutory mandates?

Defendants-Appellants City of Sault Ste. Marie, Eric Fountain, Greg Schmitigal, Mike Breakie, Jeff Killips, and Bruce Lipponen answer "Yes."

Plaintiff-Appellee Alice M. Brown answers "No."

The Chippewa County Circuit Court did not address this question, granting summary disposition to Defendants-Appellants on the basis of other deficiencies in Plaintiff's notice.

The Michigan Court of Appeals answered "No."

SUPPLEMENTAL STATEMENT OF FACTS

A. Introduction.

On June 21, 2017, this Court granted oral argument on the application filed by Defendants from the October 20, 2016 Court of Appeals' opinion finding that the trial court erred as a matter of law when granting summary disposition to Defendants based on deficiencies in Plaintiff's notice. This supplemental brief, filed pursuant to the Court's June 21, 2017 order, addresses the straightforward application of MCL 691.1404(1) and this Court's opinion in *Rowland v Washtenaw County Road Commission*, 477 Mich 197; 731 NW2d 41 (2007), to the facts of this case. This Court should find that Plaintiff's claim is properly dismissed based on a violation of MCL 691.1404(1) because she failed to file a notice which specified "the injury sustained."

B. Material facts relevant to supplemental argument.

1. Brown submitted a FOIA request to the City of Sault Ste. Marie.

The incident which forms the basis for this lawsuit occurred on May 6, 2014. On that date, while repairs to a frozen water main in the City of Sault Ste. Marie were taking place, Plaintiff-Appellee Alice Brown ("Plaintiff" or "Brown"), "curious to see what was going on outside," approached the edge of the excavation hole and fell in. (A. Brown dep, pp 22-24, 33). Brown contended that, at the time of the accident, Defendants were responsible for maintaining Sova Street in reasonable repair so that the roadway was reasonably safe and convenient for public travel. (Exhibit C[1], Complaint, ¶ 13).

[1] Unless otherwise indicated, alphabetical exhibit references refer to exhibits previously filed with Defendants' Application for Leave to Appeal. Any exhibits attached to this Supplemental Brief are numerically referenced.

On June 30, 2014, Brown's counsel sent a request under the Freedom of Information Act (FOIA) for "a copy of any and all documents relating to the ordering, conducting and methods used for Water Department or DPW employees in opening a substantial hole in the street and sidewalk surfaces near 210 Sova St., Ste. St. Marie, Michigan on May 6, 2014." (FOIA Request, 6/30/14). Brown's counsel requested "any and all documents, work orders, pictures, or any other items that are available pursuant to the Freedom of Information Act." *Id*.

The City of Sault Ste. Marie processed Brown's request, and on July 9, 2014, sent a letter to Brown's counsel "granting in its entirety" the FOIA request. (Correspondence from Sault Ste Marie City Clerk, 7/9/14). The documents provided in response to the FOIA request included a Sault Ste Marie Police Department Report, a Fire Department Report, and a Water Department Statement with daily work report logs and a couple photographs of the excavation hole. In total, the FOIA documents attached to Brown's notice consisted of nineteen pages, including five photographs. (**Exhibit 1**, Notice, 7/23/14).

2. Brown's notice to the City did not specify the injury she allegedly sustained, nor did the notice refer to FOIA documents with regard to the injury allegedly sustained.

The July 23, 2014 notice provided by Brown's attorney to the City Clerk for the City of Sault Ste. Marie did not specify the injury sustained; rather, the notice claimed, in the most general possible sense, that Brown "suffered severe and permanent injuries":

> This letter is sent pursuant to the relevant statutes requiring notice to a municipality of the intention to make a claim for injury and damage.
>
> My client, Alice Brown, suffered severe and permanent injuries due to the improper opening of a large, unguarded hole in the roadway and/or adjoining sidewalk by Ste. St. Marie city employees. These employees, upon information and belief, work for the Water Department.

> The conditions and events were, upon information and belief, witnessed by Mrs. Brown and her husband, Richard Brown, who reside at 210 Soba St., Ste. St. Marie, as well as a number of Water Department employees whose identity is revealed in the F.O.I.A. request forwarded to myself on July 9, 2014.
>
> Upon information and belief, certain fire and rescue personnel and/or police department personnel also may have seen the conditions and witnessed the injuries suffered by Mrs. Brown.
>
> Unless adjusted prior to suit, I will initiate the appropriate litigation on behalf of Ms Brown to seek an adequate award for her injury and damage suffered in this event.

(**Exhibit 1**, Notice 7/23/14) (emphasis added).

Importantly, Brown's notice did not refer to the FOIA documents with regard to the injury allegedly sustained. Rather, the notice only refers to the FOIA documents once, and only then with regard to potential witnesses to the accident. *Id*.

SUPPLEMENTAL ARGUMENT

The Court Of Appeals Erred In Concluding That Plaintiff's Notice, "When Read As A Whole," Satisfied The Notice Requirement Of MCL 691.1404(1) ("The Notice Shall Specify…The Injury Sustained") Because The Notice "Referenced Documents" That Allegedly More Fully Described Plaintiff's Injuries, Where Under The Straightforward Application Of Fundamental Principles Of Statutory Construction To The Clear And Unambiguous Language Of MCL 691.1404(1), Plaintiff's Notice Failed To Comply With The Statutory Mandates.

A. A plaintiff pursuing a claim for liability under the highway exception to governmental immunity must strictly follow the clear and unambiguous requirements set forth in MCL 691.1404(1) – which do not include an "actual prejudice" requirement.

When interpreting statutory language, the Court's obligation is to ascertain the legislative intent that may reasonably be inferred from the words expressed in the statute. *Wickens v Oakwood Healthcare Systems*, 465 Mich 53, 60; 631 NW2d 686 (2001). Where the Legislature has unambiguously conveyed its intent in the statute, the statute speaks for itself and judicial construction is not permitted. *Huggett v Dept of Natural Resources*, 464 Mich 711, 717; 629 NW2d 915 (2001). Because the proper role of the judiciary is to interpret and not write the law, courts simply lack authority to venture beyond the unambiguous text of a statute. *Id*. See also *Michigan v Bay Mills Indian Community*, 134 S Ct 2024, 2035 (2014) ("This Court has no roving license, in even ordinary cases of statutory interpretation, to disregard clear language simply on the view that …. Congress 'must have intended' something broader."); *Republic of Argentina v Weltover*, 504 US 607, 618 (1992) ("The question… is not what Congress 'would have wanted' but what Congress enacted[.]"); *Bormes v United States*, 759 F3d 793, 798 (CA 7, 2014) ("The text is what it is, no matter which side benefits"); *Burrage v United States*, 134 S Ct 881, 892 (2014) ("But in the last analysis, these always-fascinating policy discussions are beside the point. The role of this

Court is to apply the statute as it is written – even if we think some other approach might 'accord[d]' with good policy.'").

These rules of statutory construction are especially apt here, where, in enacting Michigan's broad governmental immunity from tort liability, the Legislature provided for a limited "highway" exception. MCL 691.1402(1). A plaintiff pursuing a claim for liability under MCL 691.1402 must follow the requirements set forth in MCL 691.1404(1). The terms of that statute are precise: in order to recover for injuries sustained by reason of a defective highway, the injured person, within 120 days from the time the injury occurred, must serve a notice on the government agency, in which "[t]he notice shall specify...the injury sustained."

Legislative acts requiring notice of defective highway conditions serve "(1) to provide the governmental agency with an opportunity to investigate the claim while it is still fresh and (2) to remedy the defect before other persons are injured." *Plunkett v Dep't of Transportation*, 286 Mich App 168, 176-177; 779 NW2d 263 (2009). Additionally, in *Barribeau v Detroit*, 147 Mich 119, 125-126; 110 NW 512 (1907), this Court stated:

> The requirement that a notice be given is not alone for the purpose of affording the officers of the city opportunity for investigation. It is also for the purpose of confining the plaintiff to a particular "venue" of the injury. In determining the sufficiency of the notice, excepting perhaps as to the time of the injury, the whole notice and all of the facts stated therein may be used and be considered to determine whether it reasonably apprises the officer upon whom it is required to be served of the place and the cause of the alleged injury. The nature of the defect stated may aid in locating the place, and the place may be stated with such particularity that a very general statement of the defect (cause of the injury) may be aided. But to be legally sufficient, a notice must contain a description of the place of the accident so definite as to enable the interested parties to identify it from the notice itself....When parol evidence is required to determine both the place and the nature of the defect, a reasonable notice has not been given to the city.(Citations omitted.)

In *Rowland v Washtenaw Co Rd Comm*, 477 Mich 197; 731 NW2d 41 (2007), this Court observed that the plain language of MCL 691.1404(1) is "straightforward, clear, unambiguous, and not constitutionally suspect. Accordingly, it must be enforced as written." *Id*. at 219. In arriving at this conclusion, this Court reasoned that, "inasmuch as the Legislature is not even required to provide a defective highway exception to governmental immunity, it surely has the authority to allow such suits only upon compliance with rationale notice limits." *Id*. at 212. Thus, the *Rowland* court declared that the provisions of MCL 691.1404 pass constitutional muster.[2] The *Rowland* court rejected the hybrid constitutionality engrafted onto the laws by some courts. In reading an "actual prejudice" requirement into such statute, the *Rowland* court cautioned that courts not only usurp the legislature's power but simultaneously make legislative amendment to what the legislature wanted, to wit: a notice provision with no prejudice requirement possible. In fact, this Court even went so far as to specifically overrule *Hobbs v Dep't of State Hwys*, 398 Mich 90, 96; 247 NW2d 754 (1976), and *Brown v Manistee Co Rd Comm*, 452 Mich 354, 356-357; 550 NW2d 215 (1996), which engrafted "an 'actual prejudice' requirement into the [notice] statute," requiring the governmental agency to demonstrate actual prejudice in order to bar a plaintiff's claim where the plaintiff's notice failed to comply with the notice requirements. *Rowland*, *supra* at 213-214.

As this Court stated in *Robertson v Daimler-Chrysler Corp*, 465 Mich 732, 748; 641 NW2d 567 (2002), the legislature is presumed to have intended the meaning that is plainly

[2] The *Rowland* Court also mentioned the fact that public and private tortfeasors can be treated differently under MCL 691.1404(1) and that it does not offend the constitution to do so because in such economic or social regulatory legislation, there can be distinctions between classes of persons when there is a rational basis for it.

expressed. The expressed language is clear; judicial construction is not permitted. The statute must be enforced as written. MCL 691.1404(1) requires that notice be given as directed and notice is adequate if it is served within 120 days and otherwise complies with the requirements of the statute. That is to say that the notice must specify the exact location and nature of the defect, the injury sustained, and the names of the witnesses known at the time by the claimant no matter how much prejudice is actually suffered. The notice provision is not satisfied if notice is served more than 120 days after the accident even if there is no prejudice to the governmental agency, as *Brown* claims is the case here.

In short, since the Legislature did not provide for an "actual prejudice" requirement, it should not be read into the statute. But the Court of Appeals' opinion does exactly that. Departing from *Rowland* and the well-established rules of statutory interpretation, the Court of Appeals held that Defendants were not actually prejudiced by the deficient notice because the police report and ambulance report "were mailed by the very person that plaintiff served her notice upon…" (Exhibit A, Opinion, p 6). The Court of Appeals also reasoned that "plaintiff's notice and referenced documents clearly afford the officer opportunity for investigation and determination of venue." *Id*. However, nowhere in the Court of Appeals' opinion was *Rowland*'s directive that the notice provision is "clear" and "unambiguous" and "must be enforced as written" discussed and applied. Had the Court of Appeals applied *Rowland*, it would have held that Brown's notice was statutorily deficient for failure to include within the four corners of the notice a description of "the injury sustained" and upheld dismissal of her claim. *Rowland* clearly and unambiguously calls for strict application of the provisions of MCL 691.1404(1). See also *Jakupovic v City of Hamtramck*, 489 Mich 939; 798 NW2d 12 (2011) (reversing the Court of Appeals' "excusal"

of the plaintiff's error in providing the wrong address in giving notice to the defendant of an alleged defect in a sidewalk and reaffirming that "[t]he statute requires notice of 'the exact location' of the defect, and in this case, the plaintiff failed to specify the correct address where the defect was allegedly located."). The need to adhere to the requirements of §1404(1) is not excused by the arguments that *Brown* advances here. It makes no difference to the proper outcome of this appeal that the same documents Brown included with her notice (police and ambulance reports) were the same ones provided to Brown by the City of Sault Ste. Marie in response to a FOIA request. That Brown dislikes or disfavors the situation created by exacting adherence to the rules and regulations pertaining to notice that are part of Michigan's statutory governmental immunity scheme does not warrant a disregard of the controlling law but demands that *Brown* adhere to the clear and plain statutory requirement governing pursuit of an action under MCL 691.1402. The *Rowland* and *Jakupovic* cases require that there be notice of "the injury sustained" under MCL 691.1404(1). It is undisputed that Brown failed to provide the proper notice of the alleged injury sustained that would comply with the notice requirements of *Rowland* and *Jakupovic*. Brown engages in nothing more than a flagrant attempt to rewrite §1404(1). This is well beyond the court's scope of authority. In sum, Brown's claims are barred by her failure to comply with the notice requirement of MCL 691.1404(1) and the specificity required by the clear and unambiguous language of that statute as its meaning was confirmed in *Rowland.*

For this reason, peremptory reversal, or alternatively leave to appeal, is proper.

B. A reference to FOIA or other documents, with regard to another notice requirement, does not "remedy" the insufficiency of the notice.

The particular rule carved out by the Court of Appeals in this case is objectionable on yet another ground: it converts a strict compliance provision to one of mere substantial compliance. The Court of Appeals' opinion reasons that, although Brown's notice which alleged "'severe and permanent damages' might have been insufficient by itself…that insufficiency was remedied by reference to the FOIA documents." (Opinion, p 6). In other words, the Court of Appeals ruled that a plaintiff will be found to have complied with § 1404(1)'s requirements, even if the notice by itself is plainly insufficient for failure to provide the required descriptions, so long as the plaintiff references other documents which arguably contain information that "fills in the blanks" of the notice.

At the outset, the Court of Appeals' opinion overlooks and/or disregards that Brown's only reference to the FOIA documents was with regard to possible witnesses – another notice requirement. Specifically, Brown referred to the FOIA documents only in the context of providing the identity of other Water Department employees who may have witnessed the incident in question:

> The conditions and events were, upon information and belief, witnessed by Mrs. Brown and her husband, Richard Brown, who reside at 210 Soba St., Ste. St. Marie, as well as a number of Water Department employees whose identity is revealed in the F.O.I.A. request forwarded to myself on July 9, 2014.

(**Exhibit 1**, Notice). The notice did not refer to the FOIA documents as providing further detail on her claim of "severe and permanent injuries[.]" *Id*. But, even if it had, the notice is still insufficient.

The cases that lend the most guidance on this point under the facts of this case are unpublished and are consistent with Defendants' view that the strict compliance

requirement of § 1404(1), as set forth in *Rowland*, was not satisfied by reference to, or attachment of, other documents to the notice. For example, in *Bowers v Dept of Transportation*, Michigan Court of Appeals Docket No. 293965, rel'd November 18, 2010 (unpublished); 2010 WL 4673434 (**Exhibit 2**), a notice's reference to a police report with regard to potential witnesses was held insufficient to satisfy the "exact location and nature of the defect" requirement of § 1404(1). The plaintiff in *Bowers* was traveling eastbound on I-94 on a motorcycle when he lost control of the motorcycle as he entered the exit ramp from I-94 to 21 Mile Road. When he lost control of his motorcycle, he left the ramp, and went into a grassy ditch beside the ramp. *Id*. at *1. The plaintiff filed a notice of injury and highway defect pursuant to MCL 691.1404. The notice said as follows about the location and nature of the defect:

> On or about May 27, 2006, Michael C. Bowers was caused to lose control of his motorcycle due to pavement defects then and there existing on the eastbound I-94 exit ramp to 21 Mile Road in Macomb County.

Id. The notice contained the following statement regarding witnesses:

> There was a witness in the vehicle in front of Mr. Bowers and a witness in a vehicle traveling behind Mr. Bowers. Unfortunately, the Chesterfield Township Police Report does not reflect the identity of said witnesses, despite the fact that the police talked to at least the following [sic] witnesses. We will endeavor to identify such witnesses through investigation.

Id. The referenced police report was not attached to the notice. *Id*.

The defendant sought dismissal of the plaintiff's claim on the basis that the plaintiff's notice was per se defective because it did not specify the exact location and nature of the defect. *Id*. at *2. Over the plaintiff's argument that he substantially complied with the notice provision and that the defendant was apprised of the exact location and

nature of the defect "because it investigated and photographed[3] the same defects on the ramp that he claimed were the cause of the accident[,]" the trial court granted summary disposition to the defendant, holding that the description of the location set forth in the plaintiff's notice "is technically insufficient and does not comply with the [*Rowland*] Court's interpretation of" § 1404(1) and the "opinion's directions to the trial courts." *Id*. at *3.

On appeal, the Court of Appeals affirmed, noting that the plaintiff's reference to the unattached police report with regard to potential witnesses did not comply with the statutory requirement that the notice "shall specify the exact location and nature of the defect":

> The notice did not contain any references to any specific defect in the one-quarter mile long exit ramp. Rather, the notice referred only to "pavement defects". Plaintiff's notice did not attach any of the photographs taken of the scene on the day of the accident. Although the notice mentions a police report with regard to potential witnesses to the accident, the report was not attached to the notice. Further, the notice did not refer to the report with regard to the location and nature of the defect. It is impossible to tell from the meager description where to begin looking, or to what claims plaintiff could be limited in subsequent litigation. When viewed as a whole, it cannot reasonably be stated that plaintiff's notice complied with the content requirements of MCL 691.1404(1). Indeed, at least with regard to the highway exception to governmental immunity, the *Rowland* court had stated that there must be strict compliance with the conditions and restrictions of the statute. Since then, cases construing the highway exception have strictly adhered to the letter of the statute, and this Court remains bound by *Rowland's* insistence on strict compliance with the statutory requirements.

Id. at *6 (emphasis added).

Similarly, in *Montford v Detroit*, Michigan Court of Appeals Docket No. 297074, rel'd June 28, 2011 (unpublished); 2011 WL 2555395 (**Exhibit 3**), the Court of Appeals rejected

[3] The defendant's investigator, unaware of the exact location of and nature of the alleged defect, photographed the entire 21 Mile Road exit ramp. *Bowers*, *supra*, at *1.

the plaintiff's attempt to remedy a transposition of the numbers in the address stated in her notice with photographs attached to the notice which depicted the location where she tripped and fell.[4] The photographs were taken at close range, making it difficult to see the surrounding area. Framing the issue as "whether the notice provision demand strict compliance and whether constructive notice is sufficient[,]" the *Montford* court rejected the notion that constructive notice satisfies the statute. As the *Montford* Court aptly observed, "although the term 'notice' is unmodified in MCL 691.1404(1), the term 'specify' in the second sentence indicates that actual, rather than constructive, notice is required." *Id*. at *4. Further, a reading of the statute to contemplate constructive notice would nullify the term "specify". In compliance with *Jakupovic* and *Rowland*, the *Montford* court ruled that MCL 691.1404(1) "clearly and unambiguously requires actual notice" and that the trial court erred in denying the defendant's motion for summary disposition on the ground that the defendant received constructive notice by virtue of the photographs. *Id*.

Here, as in *Bowers*, Brown's notice referred to FOIA documents <u>not</u> with respect to the notice requirement at issue, i.e., the injury sustained, but rather only with respect to identity of the witnesses – another notice requirement not at issue. Accordingly, even if the attached police and ambulance reports might have provided more information on "the injury sustained," Brown's notice did not even inform Defendants that she was relying on

[4] The plaintiff's attorney sent a letter to the defendant's law department stating that the incident occurred in front of 14741 Kenfield Street. The attorney attached photos showing the portion of sidewalk on which the plaintiff tripped. After reviewing maps and records in an attempt to ascertain whether the City had jurisdiction over the location, the inspector determined that 14741 Kenfield did not exist. The plaintiff realized that there had been a transposition of the numbers in the address stated in the notice and acknowledged that the incident took place at 14174 Kenfield. Still, the plaintiff argued that the defendant received sufficient notice under §1404 because of the fact that the notice included photographs of the location of the plaintiff's trip and fall.

the FOIA documents for that purpose. Brown would have a governmental agency scour through any attachments provided with the notice and place the burden on the governmental agency to locate within those attachments any missing facts from the notice. But that is directly contrary to what the statute commands. As a limited exception to Michigan's broad grant of governmental immunity, the Legislature has placed conditions or limitations on a plaintiff's ability to invoke the highway exception. Under the plain language of MCL 691.1404(1), an injured person pursuing a claim based on the highway exception to governmental immunity "shall serve a notice on the governmental agency" which "shall specify…the injury sustained." Brown's act of supplying FOIA documents along with her notice did not serve to eliminate the error in Brown's notice as to a specific description of the injury sustained.

It is not difficult to envision a situation in which an injured person, guided by the Court of Appeals' decision in this case, sends to a governmental agency a written notice which provides little more than a directive to "see the attached documents" for a description of the exact location and nature of the defect, the injury sustained and the names of the witnesses known at the time by the claimant. The attached documents might take the form of photographs or incident, police, and/or other reports. Under the Court of Appeals' decision, this could arguably satisfy the statute. However, even if attached documentation might include all the necessary information required by § 1404(1), the unambiguous statutory language requires that this information be contained within the written notice itself ("the notice shall specify…"). Unless a plaintiff exactly satisfies the statutory notice provision, she is barred from recovery. Knowledge of the operative facts is not the equivalent of a plaintiff providing those facts in a written notice.

The Legislature intended that the necessary components of § 1404(1) be contained *within the four corners of the notice* to avoid the court looking to "supporting documentation" or other circumstances to determine the fact of, and specificity needed, of injury. Brown's Supplemental Brief relies almost exclusively on *Plunkett v Dep't of Transportation*, 286 Mich App 168; 779 NW2d 263 (2009). (Plaintiff's Supplemental Brief, 8/15/17, pp 3-5). However, while the *Plunkett* Court stated that "a liberal construction of the notice requirement is favored to avoid penalizing an inexpert layman for some technical defect," the *Plunkett* Court emphasized that all the pertinent facts must be contained *within the notice itself*. *Id*. at 177, n 15 (observing prior case law stating that "[i]n determining the sufficiency of *the notice*…*the whole notice and all of the facts stated therein* may be used and considered…") (emphasis added). While Brown claims that "Defendant's own records" contained "the most accurate facts Plaintiff could provide[,]" (Supplemental Brief, p 6), the fact is that Brown did not insert those facts *in the notice*. Moreover, Brown omitted the at-issue information from the notice for no apparent reason, despite the information being made available to her well before the filing of her notice. This renders her argument about "substantial compliance" weak, and considerably without case support, even if the Court were to ignore the statutory requirement that the requisite information be contained within the four corners of the notice itself.

Finally, while Brown relies on *Plunkett* to argue that "an inexpert layman" should not be penalized "for some technical defect," (Supplemental Brief, p 4, citing 286 Mich App at 176), those concerns are not present here. There was no "inexpert layman" involved. Brown's counsel – not Brown – authored and signed the notice. (**Exhibit 1**, p Notice). In fact, the Court of Appeals in this case agreed with Brown, over Defendant's argument, that

the notice letter can be signed by the plaintiff's attorney. (Opinion, p 3). Brown cannot have her cake and eat it too by claiming on one hand that her attorney was authorized to author the notice, and then on the other hand asking the Court to dispense with the technical requirements of the notice.

For all these reasons, this Court should peremptorily reverse, or failing that, grant leave to appeal.

RELIEF

WHEREFORE, Defendants-Appellants City of Sault Ste. Marie, Eric Fountain, Greg Schmitigal, Mike Breakie, Jeff Killips and Bruce Lipponen, respectfully request that Court peremptorily reverse the court of appeals' October 20, 2016 opinion reversing the circuit court's grant of summary disposition to Defendants and, failing that, grant Defendants leave to appeal, and enter any other relief which is proper in law and equity.

Respectfully submitted,

PLUNKETT COONEY

By: /s/Hilary A. Ballentine

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Dated: August 16, 2017

STATE OF MICHIGAN

IN THE SUPREME COURT

(ON APPEAL FROM THE COURT OF APPEALS)

ALICE M. BROWN,

Plaintiff-Appellee,

v

CITY OF SAULT STE. MARIE, a Michigan municipal corporation, ERIC FOUNTAIN, GREG SCHMITIGAL, MIKE BREAKIE, JEFF KILLIPS and BRUCE LIPPONEN,

Defendants-Appellants. /

S. Ct. No. _____

MCOA No. 330508

L.C. No. 14-13459-NO

PROOF OF SERVICE

Marjorie E. Renaud, being duly sworn, deposes and says that she is an employee of the law firm of Plunkett Cooney, and that on August 16, 2017, she caused to be served a copy of the Supplemental Brief of Defendants-Appellants' City of Sault Ste Marie, Eric Fountain, Greg Schmitigal, Mike Breakie, Jeff Killips And Bruce Lipponen, and Proof of Service as follows

KIRK M. LIEBENGOOD (P28074) Attorney for Plaintiff-Appellee 717 Grand Traverse St. P O Box 1405 Flint, MI 48501	**Counsel was served via U.S. mail, with postage prepaid**

/s/Marjorie E. Renaud

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STATE OF MICHIGAN

IN THE SUPREME COURT

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EXHIBIT LIST TO DEFENDANTS-APPELLANTS' SUPPLEMENTAL BRIEF IN SUPPORT OF APPLICATION FOR LEAVE TO APPEAL

EXHIBIT	DESCRIPTION
1	Notice, 7/23/14
2	*Bowers v Dept of Transportation*, Michigan Court of Appeals Docket No. 293965, rel'd November 18, 2010 (unpublished); 2010 WL 4673434
3	*Montford v Detroit*, Michigan Court of Appeals Docket No. 297074, rel'd June 28, 2011 (unpublished); 2011 WL 255395

EXHIBIT 1

Kirk M. Liebengood, Attorney at Law

717 S. Grand Traverse St.
P.O. Box 1405
Flint, Michigan 48501-1405
(810) 232-6351

by certified mail

July 23, 2014

Robin R. Troyer
City Clerk
City of Ste. Ste. Marie
225 E. Portage Ave.
Ste. St. Marie, Michigan 49783

RE: injuries to Alice Brown on May 6, 2014

Dear Ms. Troyer:

This letter is sent pursuant to the relevant statutes requiring notice to a municipality of the intention to make a claim for injury and damage.

My client, Alice Brown, suffered severe and permanent injuries due to the improper opening of a large, unguarded hole in the roadway and/or adjoining sidewalk by Ste. St. Marie city employees. These employees, upon information and belief, work for the Water Department.

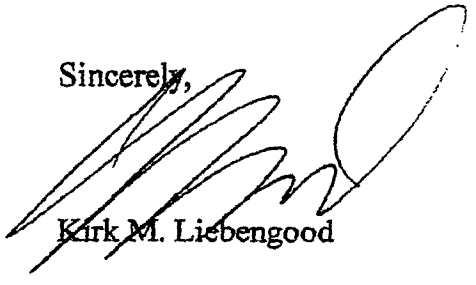
The conditions and events were, upon information and belief, witnessed by Mrs. Brown and her husband, Richard Brown, who reside at 210 Soba St., Ste. St. Marie, as well as a number of Water Department employees whose identity is revealed in the F.O.I.A. request forwarded to myself on July 9, 2014.

Upon information and belief, certain fire and rescue personnel and/or police department personnel also may have seen the conditions and witnessed the injuries suffered by Mrs. Brown.

Unless adjusted prior to suit, I will initiate the appropriate litigation on

behalf of Mrs. Brown to seek an adequate award for her injury and damage suffered in this event.

Sincerely,



Kirk M. Liebengood

KML/ww

Kirk M. Liebengood, Attorney at Law

717 S. Grand Traverse St.
P.O. Box 1405
Flint, Michigan 48501-1405
(810) 232-6351

June 30, 2014

Freedom of Information Act Coordinator
City of Ste. St. Marie
225 E. Portage Ave.
Ste. St. Marie, Michigan 49783

RE: incident on May 6, 2014 involving DPW and Alice Brown

Dear Sir or Madam:

Pursuant to the provisions of the Freedom of Information Act, I respectfully request a copy of any and all documents relating to the ordering, conducting and methods used for Water Department or DPW employees in opening a substantial hole in the street and sidewalk surfaces near 210 Sova St., Ste. St. Marie, Michigan on May 6, 2014. I request any and all documents, work orders, pictures or any other items that are available pursuant to the Freedom of Information Act. I will promptly pay your charges for providing those records once I am advised of the expense.

Thank you in advance for your anticipated cooperation.

Sincerely,

Kirk M. Liebengood

KML/ww

Robin R. Troyer CMC
City Clerk/Assistant City Manager

direct: 906/632-5717
email: cityclerk@sault.com

City of Sault Ste. Marie, Michigan

July 9, 2014

KIRK LIEBENGOOD
717 S. Grand Traverse Street
PO Box 1405
Flint, Michigan 48501-1405

RE: Freedom of Information Request received by this public body on the 7th day of June, 2014

Dear Ms. Liebengood:

I, as FOIA coordinator for the City of Sault Ste. Marie, hereby certify that your request has been granted in its entirety.

Please feel free to contact me at (906) 632-5717 should you have any questions or concerns in reference to this response.

Sincerely yours,

Robin R. Troyer CMC,
City Clerk/Assistant City Manager

[redacted]

Sault Ste. Marie Police Department -- (906) 632-5744
401 Hursley Street, Sault Ste. Marie, MI 49783

Incident No: **14-001542**
Status: **CLOSED**

Date Reported:	**Tue 05/06/2014 11:40:00**
Dispatch Time:	Arrival Time: Clear Time:
Officers:	**DESHANO, FRANCIS** Detective:
Classification:	**GENERAL ASSISTANCE -- (9908)**
Location:	**210 SOVA,SAULT STE. MARIE** Section / Nbh: /
Description:	**woman fell in Street Dept. construction site hole/closed** Entered: **DESHANO**

Victim: (9908 GENERAL ASSISTANCE)

BROWN, ALICE DOB: **02/02/1959** Age: **55**
210 SOVA ST Phone: **(906)632-0394 (Home)**
SAULT STE MARIE, MI
Race: **White** Sex: **Female**
Weight: **000 lbs.**

Complainant: (9908 GENERAL ASSISTANCE)

BROWN, RICHARD, LEE DOB: **08/12/1958** Age: **55** Soc. Sec: **305-66-2323**
210 SOVA Phone: **(906)630-1044**
SAULT STE MARIE, MI 49783 Phone: **(906)632-0394 (Home)**
Alt Phone: **(906)635-5421 (Work)**
Ops: **B650738497630 / MI**
Race: **White** Sex: **Male** Hair: **Brown** Eyes: **Hazel**
Height: **5'09"** Weight: **160 lbs.**

NARRATIVE 1 (Supplement 1) **Reporting Officer: DESHANO, FRANCIS** **05/07/14**

INFORMATION:
On 05/06/14 at approx. 1140hrs Officers were dispatched to 212 Sova for a female that fell in a well.

While in route Central advised the victim had been assisted for the well.

Upon arrival Mrs. Brown sitting on the front steps of 210 Sova. She had a very large and deep head wound. Ms. Brown was conscious and speaking. Mr. Brown was on scene as well sitting with his wife.

The reported Well was actually a City DPW Water main repair site. DPW personnel were on scene.

Sault Fire and Ambulance arrived on scene to assist Mrs. Brown.

WITNESS STATEMENT:
Mr. Brown stated he and wife were standing near the Construction site. He stated his wife handed him their small dog to take a closer look. The next thing he knew she fell head first into the hole.

Mrs. Brown was taken to WMH by Sault Fire.

Several Photos of the construction site were taken and placed on CD. The CD was placed in the evidence locker.

DISPOSITION:
Closed

Original

City of Sault Ste Marie Fire Department
125 Ridge Street
Sault Sainte Marie, MI 49783
9066322226

Patient Information

Patient Name:	Alice M Brown	**DOB:**	2/21/1959
Address:	210 Sova St.	**Age:**	55 Years
	Sault Sainte Marie, MI 49783	**Gender:**	Female
County:	Chippewa	**Phone #:**	906-630-1042

Incident Information

Incident #:	A14-0893	**Initial Responder Arrived:**	
Incident Location:	214 Sova St.	**Incident Facility Code:**	
	Sault Sainte Marie, MI 49783		
County:	Chippewa		
Incident Type:	Street or Highway	**Prior Aid:**	
Vehicle Number:	Alpha 151	**Prior Aid Performed By:**	
EMS Response Number:		**Outcome of Prior Aid:**	
Response Mode To Scene:	Lights and Sirens		
Mass Casualty Incident:	No		
# Patients At Scene:	Single	**Transfer of Care:**	
		Type of Intercept:	
Dispatch Priority:	1	**Intercept Agency:**	
Patient Priority:	1	**Intercept Person:**	
Response Urgency:	Immediate		
Dispatch Complaint:	Traumatic Injury	**Other Services at Scene:**	
CMS Service Level:		**Other EMS Agencies:**	Sault Ste Marie Police

Times

Incident Onset:		**Arrived at Patient:**	5/6/2014 11:50
PSAP:		**Left Scene:**	5/6/2014 12:05
Dispatch Notified:		**Arrived at Destination:**	5/6/2014 12:08
Unit Notified:	5/6/2014 11:47	**Back in Service:**	5/6/2014 12:34
En Route:	5/6/2014 11:48	**Cancelled:**	
Arrival Time:	5/6/2014 11:50	**Back Home:**	

Destination Information

Destination Location:	War Memorial Hospital	**Transport from Scene:**	Stretcher
	500 Osborn Blvd.	**Patient Condition at Dest.:**	Improved
	Sault Sainte Marie, MI 49783	**Incident/Patient Disposition:**	Treated, Transported by EMS
County:	Chippewa	**Reason for Choosing Dest:**	Closest Appropriate Facility (none below)
Method to Ambulance:	Stretcher	**Type of Destination:**	Hospital
Position During Transport:	Supine	**At Scene Odometer:**	36934.40
Method from Ambulance:	Stretcher	**At Destination Odometer:**	36935.70

Original

Medical History

Medical History / Surgical History: unable to obtain

Medication Allergies: demerol

Patient Medications:

Current Medication	Dose	Unit	Route
Patient Medications Not Available			

Immunization History:

Immunization History	Date

Medical History Obtained:
Presence of Emerg. Inf. Form: No
Advanced Directives:
Pregnancy: No
Barriers to Patient Care: Not Applicable

Food / Environmental Allergies: Not Applicable
Alcohol / Drug Indicators: Not Known
Sending Facility Medical Rec #:
Destination Medical Record:
Patients Primary Practitioner:

Physicians Orders/Directives

Physicians Name:

Signature: [redacted]

Medication Information

Time	Med.	Given Prior To EMS Arrival	Route	Dose	Units	Response	Tech	Authorized	Authorizing Physician
12:01	OXYGEN		Nasal cannula (prongs)	3.00	L/MIN	Unchanged	Kevin Moher	Protocol (Standing Order)	
12:05	NORMAL SALINE		Intravenous	300.00	ML	Unchanged	Robert Hipps	Protocol (Standing Order)	
12:06	ZOFRAN		Intravenous	4.00	MG	Improved	Peyton Blakely	Protocol (Standing Order)	

Original

Procedure Information

Time	Procedure	Given Prior To EMS Arrival	Equip Size	# Attempts	Success	Response	Crew Member	Treatment Authorized	Authorizing Physician
11:51	Wound Care-General		5x9 - kerlex	1	Yes	Improved	Peyton Blakely	Protocol (Standing Order)	
11:53	Spinal Immobilization		Long back board	1	Yes	Unchanged	Peyton Blakely	Protocol (Standing Order)	
12:00	Cardiac Monitor			1	Yes	Unchanged	Robert Hipps	Protocol (Standing Order)	
12:02	Venous Access-Extremity		20ga.	2	No	Unchanged	Peyton Blakely	Protocol (Standing Order)	
12:04	Venous Access-Extremity		20ga.	1	Yes	Unchanged	Robert Hipps	Protocol (Standing Order)	
12:05	Contact Medical Control			1	Yes	Unchanged	Robert Hipps	Protocol (Standing Order)	

Exam Information

Assessment Date:
Estimated Body Wt:
Broselow/Luten Color:
Revised Trauma Score:
Peds Trauma Score:
APGAR 1 Min:
APGAR 5 Min:

Assessments

Skin:	Normal, Dry, Warm	**Thoracic:**	Normal
Head / Face:	Not Available	**Lumbar / Sacral:**	Normal
Neck:	Normal	**Extremity Right Upper:**	Tenderness
Chest / Lungs:	Normal	**Extremity Right Lower:**	Normal
Heart:	Not Done	**Extremity Left Upper:**	Normal
Abdomen Left Upper:	Normal	**Extremity Left Lower:**	Normal
Abdomen Left Lower:	Normal	**Left Eye:**	Reactive
Abdomen Right Upper:	Normal	**Right Eye:**	Reactive
Abdomen Right Lower:	Normal	**Mental Status:**	Normal, Oriented-Person, Oriented-Place, Oriented-Time, Oriented-Events
GU:	Not Done	**Neurological:**	Normal
Cervical:	Normal		

Impressions

Complaint	Description	Duration	Time Units
Chief	Facial Laceration		
Secondary			

Other Associated Symptoms: Pain
Chief Complaint Anatomic Location: Head
Chief Complaint Organ System: Skin
Providers Primary Impression: Traumatic injury
Providers Secondary Impression:
Primary Symptom: Bleeding
Possible Injury: Yes

Original

Vitals Information

Time	Desc.	Obtained Prior to this Units EMS Care	Cardiac Rhythm	BP	BP Treat Type	Pulse Rate	Elec Monitor Rate	Pulse Oximetry	Pulse Rhythm	Resp Rate	Resp Effort
12:01			Normal Sinus Rhythm	102/74	Manual Cuff	84	84	99	Regular	14	Normal

Time	Carbon Dioxide	Blood Glucose Level	Temp (F)	Temp Method	LOR	Pain Scale	Stroke Scale	Immobilyte Screen
12:01		149			Alert			

Time	Glasgow Coma Score Eye	Glasgow Coma Score Verbal	Glasgow Coma Score Motor	Glasgow Coma Score Qualifier	Total Glasgow Coma Score
12:01	Opens Eyes spontaneously: 4	Age > 5 years: 5 = Oriented and appropriate speech	Age > 5 years: 6 = Obeys commands with appropriate motor response	Initial GCS has legitimate values without interven	15

Spinal Injury

Altered Mental Status:	NA	**Cervical Tenderness:**	NA
Evidence of Intoxication:	NA	**Thoracic Lumbar Pain:**	NA
Neurological Deficit:	NA	**Thoracic Lumbar Tenderness:**	NA
Suspect Extremity Fracture:	NA	**Spine Immobilization:**	NA
Cervical Pain:	NA	**C-Collar Size:**	

Narrative/Protocols Used

Narrative

Called to listed incident address for a female who has fallen down into a well. ATF above female sitting on front porch, alert, with a C/C of facial laceration. Per Captain Sanford the pt. was walked up to hole, tripped, and fell face first into a pipe that had been cut. The pt. had fallen approx. 10ft. Bystanders had helped pt. out of hole prior to EMS arrival. SSMFD E57 and SSMPD on scene prior to EMS arrival. Pt. is holding paper towel to left side of forehead prior to EMS arrival. Removed paper towel and placed 5x9 with kerlex on wound which controlled the bleeding. approx. 8cm laceration / avulsion noted to left side of pt.'s forehead. IPS revealed clear ABC's, skin warm/pink/dry, pt. A/O x 4, neg. neck / back pain, pos. head pain, pos. facial numbness, neg. SOB, pos. LOC, neg. JVD, neg. TD, pos. bilateral equal chest rise / fall, pos. minor abrasion noted to pt.'s right elbow with all bleeding controlled, neg. weakness, neg. confusion, pms in all extremities, neg. n/v. Pt. neck and back palpated with neg. tenderness / deformity. Pt. placed on long back board with cervical collar and straps x 4. Pt. carried to cot. Cot to ambulance. IV, O2, vitals and ECG as listed. Monitor showing normal sinus rhythm. BLG obtained at 149. Secondary survey revealed an onset of nausea, pms in all extremities, lung sounds clear in all fields, pupils PERRL and no further findings. Pt. administered 4mg Zofran as listed with improvement from nausea. WMH medical control contacted priority 1 and given full report with no orders received. Arrived at WMH and gave full report to DR. Burch in room.* '

* '

Peyton L. Blakely* '
EMT-P* '
SSMFD

Protocols Used

Universal Patient Care

NHTSA Injury Matrix

Skin:	Not Applicable	**Spine:**	Not Applicable
Head:	Not Applicable	**Upper Extremities:**	Not Applicable
Face:	Not Applicable	**Pelvis:**	Not Applicable
Neck:	Not Applicable	**Lower Extremities:**	Not Applicable
Thorax:	Not Applicable	**Unspecified:**	Not Applicable
Abdomen:	Not Applicable		

Original

CPR Situation		Trauma Situation	
Chief Cardiac Arrest:	Not Applicable	**Cause of Injury:**	Not Applicable
Chief Cardiac Arrest Etiology:	Not Applicable	**Intent of Injury:**	Not Applicable
Arrest Witnessed By:	Not Applicable	**Height of Fall:**	0
First Monitored Rhythm of Patient:	Not Applicable	**Seat Row Location of Patient in Vehicle:**	0
Spontaneous Circulation Return:	Not Applicable	**Position of Patient in Vehicle:**	Not Applicable
Neurological Outcome Hospital Discharge:	Not Applicable	**Mechanism of Injury:**	Not Applicable
Est. Time of Arrest Prior to EMS:	Not Applicable		
Date/Time Resuscitation Stopped:	1/1/2000 0:00	**Vehicle Injury Indicators:**	Not Applicable
Reason CPR Discontinued:	Not Applicable	**Use of Occupant Safety Equipment:**	Not Applicable
Resuscitation Attempted:	Not Applicable	**Areas Impacted By Collision:**	
Cardiac Rythm At Hospital:	Not Applicable	**Airbag Deployment:**	Not Applicable

Crew

Crew Member	Certification Level	Role
Peyton Blakely	EMT-Paramedic	Primary Patient Caregiver
Robert Hipps	EMT-Paramedic	Secondary Patient Caregiver
Kevin Moher	EMT-Paramedic	Third Patient Caregiver

Miscellaneous Information

Review Requested:		**Suspected Contact Fluids:**	
Required Reportable Conditions:		**Protective Equip Used:**	Gloves
Research Survey Field:		**Suspected Disaster:**	
Research Survey Field Title:		**Type of Contact:**	
Potential Registry Candidate:		**Personnel Exposed:**	
Trauma Registry ID:		**Police Report Number:**	
Report Generated By:	Peyton Blakely	**Fire Incident Report Number:**	
		Patient ID / Band Number:	

Original

Signatures

I request that payment of authorized Medicare, Medicaid, or any other insurance benefits be made on my behalf to City of Sault Ste Marie Fire Department for any services provided to me by City of Sault Ste Marie Fire Department now, in the past or in the future. I understand that I am financially responsible for the services and supplies provided to me by City of Sault Ste Marie Fire Department, regardless of my insurance coverage, and in some cases, may be responsible for an amount in addition to that which was paid by my insurance. I agree to immediately remit to City of Sault Ste Marie Fire Department any payments that I receive directly from the insurance or any source whatsoever for the services provided to me and I assign all rights to such payments to City of Sault Ste Marie Fire Department. I authorize City of Sault Ste Marie Fire Department to appeal payment denials or other adverse decisions on my behalf without further authorization. I authorize and direct any holder of medical information or other relevant documenation about me to release such information to City of Sault Ste Marie Fire Department and its billing agents, the Centers for Medicare and Medicaid Services, and/or any other payors or insurers, and their respective agents or contractors, as may be necessary to determine these or other benefits payable for any services provided to me by City of Sault Ste Marie Fire Department , now, in the past, or in the future. I understand that if I fail to pay any outstanding balances due, City of Sault Ste Marie Fire Department may forward my account to a collection agency and/or take legal action against me for payment, in accordance with our payment and collection policy and local ordinance and state and federal collection laws. Delinquent accounts may be subject to additional fees, including, but not be limited to, lawful interest on the outstanding balance, reasonable attorneys' fees and court costs. A copy of this form is as valid as an original.

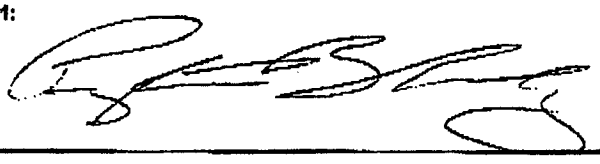
Patient Unable to Sign Due To: facial injury

Patient or Authorized Signature: [redacted]

Representative of an agency or institution that furnished care services or assistance to the patient: [redacted]

Hospital Rep: [redacted]

EMS Tech 1: [redacted]



EMS Personnel (Primary): Peyton Blakely

EMS Personnel (Secondary): Not Provided

Drug Box

Box Number In:

Box Number Out:

Supplies Restocked By:

Medications Restocked By:

[redacted]

Controlled substance contaminated or lost through spillage, or partially used.

Medication:

Hospital Rep Signature:

[redacted]

Paramedic Signature:

[redacted]

Event Log

Unit	Empl ID	Type	Description	Time Stamp	Comments	Close Code	User
		TS	Time Spawned	05/06/14 11:47:21	Initial call received at 05/06/2014 11:45:02		RRAMBO
		CHG	Changed Nature	05/06/14 11:48:25	GEN ASSIST/WELL BEING --> FIRE ALL		RRAMBO
		PAGE	Automatic Nature Page	05/06/14 11:48:26	Paged 17_B66E		PAGESRV
		RECO	Unit Rec Btn Click	05/06/14 11:48:27	Unit recommend for FIRE ALL OTHER at 2		RRAMBO
		RECO	Unit Recommendation	05/06/14 11:48:31	Recmnd:C766FD [FIREST]		RRAMBO
		RECO	Unit Recommendation	05/06/14 11:48:31	Plan: 17AA Cat: 1FST Lvl: 1		RRAMBO
		PAGE	Dispatch Page	05/06/14 11:48:32	Paged 17_B66F		PAGESRV
		ARM	Added Remarks	05/06/14 11:49:17			RRAMBO

STATEMENT

WATER DEPARTMENT

CITY OF SAULT STE. MARIE
325 Court St., Sault Ste. Marie, MI 49783
Ph: (906) 632-3531

Name _____

Address _____

City _____

Date _____ Account No. _____ Tap No. _____

Work performed: Cut & Cap (and attempt to thaw) shattered main on 200 Block of Sova St. on 5-6-2014 (all work performed on OT)

TIME					EQUIPMENT				
Name	Hrs.	Rate	Total		Name	Hrs.	Rate	Total	
Eric Fountain	8	$33.27	$266	16	JCB Backhoe	8	$37.65	$301	20
Gregg Sommerville	8	$30.32	$242	56	Vactor Truck	8	$78.51	$628	08
Mike Bacigle	8	$29.54	$236	32	Tandem Dump	8	$42.82	$342	40
Bruce Lippola	8	$28.98	$231	84	W/D 7	8	$16.12	$128	96
Jeff Kemp	8	$30.65	$245	20	Steamer Trailer	4	$53.32	$213	36
			$1,222	08	+20% Depreciation Fee: $323.00			$1,938	00
					MATERIALS				
+44% Fringes			$537	72	Amount		Price	Total	
					2	6" Caps - M.J.	$33	$66	00
					2	6" Retainers w/Access.	$68	$136	00
					30yds	Sand	$2.75	$82	50
					15yds	22A Gravel	$6.25	$93	75
								$378	25
						+10% Restock Fee		$37	83
						Estimated Restoration Fee: Unknown at this time, as over 200 ft of main was C&C'd			
			$1,759	80				$416	08

Sub Total		
Admin. Cost		
Total	$4,113	88

Approved by _____

CITY OF SAULT STE. MARIE WATER DEPT.

Sault Printing

DAILY WORK REPORT

DATE 5-6-14

NAME F. Fountain HOURS 16

EQUIPMENT Backhoe, h07, DumpTRuck, Vactor, steamer HOURS

JOB & LOCATION	Hours	MATERIAL Amt.	Size	Kind
Fix main Break 800 E 7th Ave	8	6	6"	S.S.S
		16 yrds	sand	6 yrds Gravel
Fix main break Soust CFC	8	2	6"	caps
		30 yrds sand		
		15 yrds gravel		

NAMES OF OTHERS IN CREW	HOURS
Greg	16
Jeff	16
Bruce	16
Mike	16

STATEMENT

WATER DEPARTMENT

CITY OF SAULT STE. MARIE
325 Court St., Sault Ste. Marie, MI 49783
Ph: (906) 632-3531

Name _____

Address _____

City _____

Date 6-16-14 Account No. _____ Tap No. _____

Work performed: Inspect / Replace service to 210 So. Main was cut & capped from freeze damage on 5-6-14 — Work performed on 6-16-14

TIME					EQUIPMENT				
Name	Hrs.	Rate	Total		Name	Hrs.	Rate	Total	
Eric Fountain	9	~~$18~~ $27	$210	71	JCB Backhoe	9	$37.65	$338	85
Gregg Semmelroth	9	~~20.21~~ 30.32	$192	00	Case Backhoe	9	$37.65	$338	85
Tom Cook	9	~~20.21~~ 30.32	$192	00	Tandem Dump	9	$42.80	$385	20
Mike Breakie	9	~~19.69~~ 18.98	$187	06	WD 7	9	$16.12	$145	08
			$781	77					
					+20% Depreciation Fee: $24.60			$1,450	38
					MATERIALS				
+44% Fringes			$343	98	Amount		Price	Total	
					1	3/4" Corp & Adapter	$76	$76	00
					1	3/4" Curb Stop	$102	$102	00
					1	3/4" Union-Compression	$24	$24	00
					1	Curb Box-Complete	$76	$76	00
					140'	3/4" CTS HDPE Pipe	$0.28	$39	20
					16yds	Fill Sand	$2.75	$44	00
					16yds	22A Gravel	$6.25	$100	00
								$461	20
						+10% Restock Fee:		$46	12
			$1,125	75				$507	32

Sub Total		
Admin. Cost		
Total	$3,083	45

Approved by _____

Sault Ste. Marie Printing

CITY OF SAULT STE. MARIE WATER DEPT.

DAILY WORK REPORT

DATE 6-16-2014

NAME ERIC FOUNTAIN HOURS 9

EQUIPMENT HOURS

JOB & LOCATION	Hours	MATERIAL Amt.	Size	Kind
RESTORE WATER SERVICE (a)		210	SOVA	
-3/4" CORP.				
-3/4" 45° ELBOW FLARE TO COMPRESSION				
1-3/4" CURB STOP COMPRESSION TO COMP.				
1-3/4" COMP TO COMP UNION				
1-CURB BOX COMPLETE				
140' OF 3/4" CTS & 4-3/4" INSERTS				
2 LOADS SAND				
2 LOADS GRAVEL				

NAMES OF OTHERS IN CREW		HOURS
GREGG	COMP	9
MIKE	"	9
TOM		9

STATEMENT

WATER DEPARTMENT

CITY OF SAULT STE. MARIE
325 Court St., Sault Ste. Marie, MI 49783
Ph: (906) 632-3531

Name _____

Address _____

City _____

Date _____ Account No. _____ Tap No. _____

Work performed: Isolate Sova Watermain Break on 5-4-2014 (Sunday)

_____

TIME					EQUIPMENT				
Name	Hrs.	Rate	Total		Name	Hrs.	Rate	Total	
Eric Fountain	3	$35.27	$105	81	Vactor	3	$78.51	$235	53
Jim Price	3	$32.42	$97	26	WDT	3	$16.12	$48	36
Jeff Killips	3	$30.65	$91	95					
Pete Pratt	3	$30.17	$90	51					
			$385	53					
					+20% Depreciation Fee: $56.78			$340	67
+44% Fringes			$169	63	MATERIALS				
					Amount		Price	Total	
			$555	16					

Sub Total		
Admin. Cost		
Total	$895	83

Approved by Sara Monroe

CITY OF SAULT STE. MARIE WATER DEPT.

Sault Printing

DAILY WORK REPORT

DATE 5-4-14

NAME Jeff Kilips HOURS 3

EQUIPMENT HOURS

JOB & LOCATION	Hours	MATERIAL Amt.	Size	Kind
Broken main - 214 Sovel	3			
Isolated Leak (Sunday)				

NAMES OF OTHERS IN CREW	HOURS
Tim P.	3
Eric F.	3
Pete P.	3

EXHIBIT 2

2010 WL 4673434
Only the Westlaw citation is currently available.

UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITING.

UNPUBLISHED
Court of Appeals of Michigan.

Michael BOWERS, Plaintiff-Appellant,
v.
DEPARTMENT OF TRANSPORTATION,
Defendant-Appellee.

Docket No. 293965.
|
Nov. 18, 2010.

West KeySummary

1 **Automobiles**
Notice of Claim for Injury

Injured motorist's description of the exact location and nature of the highway defect which allegedly caused motorist to lose control of his motorcycle did not satisfy the notice requirement for his claim to fall within the highway exception to governmental immunity. Motorist described the "exact location" of the highway defect as a quarter-mile long highway off-ramp. Motorist's description of the "exact nature" of the highway defect was "pavement defects." As such, motorist's notice did not provide the state department of transportation with enough information to investigate motorist's claim while it was still fresh. M.C.L.A. §§ 691.1404(1), 691.1402(1).

Cases that cite this headnote

Court of Claims; LC No. 08-000091-MD.

Before: SAWYER, P.J., and FITZGERALD and SAAD, JJ.

Opinion

PER CURIAM.

*1 Plaintiff appeals as of right the order granting summary disposition pursuant to MCR 2.116(C)(7) in favor of defendant in this action brought pursuant to the highway exception to governmental immunity. We affirm.

On May 27, 2006, plaintiff was traveling eastbound on I-94 on a motorcycle. According to plaintiff, he was traveling at approximately 65 mph as he entered the exit ramp from I-94 to 21 Mile Road. He lost control of his motorcycle, left the ramp, and went into the grassy ditch beside the ramp. After plaintiff was taken to the hospital, his son and his friend, Dean DeAngelo, arrived at the scene and took photographs of the ramp, including the portion of the ramp plaintiff later claimed was the defective pavement that caused him to lose control of his motorcycle. According to plaintiff, he first saw DeAngelo's photographs about a week after the accident.

Within days of the accident, plaintiff consulted an attorney who sent an investigator out to the exit ramp on June 1, 2006, to take photographs and a videotape of the ramp. On June 21, 2006, plaintiff's liability expert received a packet in the mail from plaintiff's attorney that included the photos taken by DeAngelo on the date of the accident, the photos and video of the ramp taken by the investigator, and a copy of the UD-10 Traffic Crash Report.

On June 29, 2006, plaintiff filed a notice of injury and highway defect pursuant to MCL 691.1404. The notice contained the following description of the location and nature of the defect:

> On or about May 27, 2006, Michael C. Bowers was caused to lose control of his motorcycle due to pavement defects then and there existing on the eastbound I-94 exit ramp to 21 Mile Road in Macomb County.

The notice contained the following statement regarding witnesses:

> There was a witness in the vehicle in front of Mr. Bowers and a witness in a vehicle traveling

> behind Mr. Bowers. Unfortunately, the Chesterfield Township Police Report does not reflect the identity of said witnesses, despite the fact that the police talked to at least the following [sic] witnesses. We will endeavor to identify such witnesses through investigation.

Neither the police report nor any of the photographs taken on the day of the accident were attached to the notice.

Defendant received the notice on July 17, 2006. An investigator for defendant was sent to the 21 Mile Road exit ramp to conduct a scene investigation on October 14, 2006. The investigator obtained a copy of the UD-10 Traffic Crash Report, which contained a description of the accident:

> Veh # 1 cycle existing 21 mi (E.B.) and went off roadway and loss [sic] control of cycle on gravel shoulder.

The diagram of the ramp in the report depicts the motorcycle traveling in stages and coming to rest near the top of the ramp in the grassy area between the ramp and close to 21 Mile Road. However, the written description of the accident location provided in the report states that the accident occurred a quarter of a mile south of 21 Mile Road. Consequently, the investigator, unaware of the exact location of and nature of the alleged defect, took photographs of the entire 21 Mile Road exit ramp.

***2** On the date of the accident, plaintiff told the investigating officer and his treating orthopedist that gravel on the road caused his accident. The UD-10 Traffic Crash Report provides the assessment of the officer at the scene that plaintiff lost control of his motorcycle on the "gravel shoulder." The orthopedic surgeon who treated plaintiff on the date of the accident wrote in the medical records that plaintiff stated that he "hit gravel and went flying airborne ... off his motorcycle into a ditch." Similarly, the report by the EMS technicians who took plaintiff to the emergency room wrote, "Ejection from motorcycle on off ramp ... hitting gravel ..." And, in his first response to defendant's interrogatory to describe "any condition, natural or otherwise, which played a part in the incident," plaintiff responded "[l]oose gravel."

Plaintiff alleged in his complaint that gravel, as well as "potholes, depressions, cracks, subsidences and other defects" caused him to "take evasive action to avoid the area, and lose control of the motorcycle. At his December 22, 2008, deposition, plaintiff testified that he told the officer who responded to the accident that he hit "bad road, gravel." He testified that the gravel was "on the road." He explained:

> I just told them there was loose gravel. He said what happened? I said I hit the bad road of the gravel and stuff."

When asked if he told the officer about "broken concrete or anything like that," he stated that "[g]ravel [is] probably what I just told him." Plaintiff testified that he was trying to shake his motorcycle out of the "rut" in the pavement before encountering gravel on the road. He maintained at his deposition that it was a stretch of broken concrete and poorly maintained pavement on the exit ramp that caused his accident, in conjunction with the gravel.

After conducting discovery and twice deposing plaintiff, defendant filed a motion for summary disposition arguing that plaintiff's pre-suit notice was per se defective because it did not specify the exact location and nature of the defect or identify the two material witnesses who arrived at the accident scene later that day to pick up plaintiff's motorcycle and photograph the ramp. Specifically, defendant alleged that the notice provided no information whatsoever as to the nature of the "pavement" defect or where on the one-quarter mile long exit ramp the alleged defect could be found.

Defendant argued that plaintiff did not comply with the notice provision-or even substantially comply with it-and that defendant was prejudiced by that failure. It maintained that the notice not only failed to apprise defendant of the nature and location of the alleged defect, but that no photograph of the scene portrayed the location of the motorcycle or any evidence of what caused the accident.

Plaintiff responded by arguing that he substantially complied with the notice provision and that defendant was apprised of the exact location and nature of the defect because it investigated and photographed the same defects on the ramp that he claimed were the cause of the accident.

*3 Following a hearing on the motion, the trial court issued a written opinion and order granting defendant's motion on the ground that plaintiff failed to comply with the notice provision. The court stated in part:

> Defendant Michigan Department of Transportation moved for summary disposition pursuant to MCR 2.116(C)(7), asserting plaintiff's Notice of Intent pursuant to MCL 691.1404(NOI), required by MCL 691.1404[sic], provided insufficient facts showing the "exact location and nature of the defect" as required by MCL 691.1404(1).
>
> Plaintiff's NOI described the location of the motor vehicle accident where plaintiff was injured, allegedly because of defective highway conditions, as "pavement defects then and there existing on the eastbound I-94 ramp to 21-Mile Road in Macomb County."
>
> Defendant principally relies on the Michigan Supreme Court's decision in *Rowland v. Washtenaw Co. Rd. Comm.*, 477 Mich. 197, 731 N.W.2d 197 (2007).
>
> * * *
>
> The Court noted, at p. 205, the bases for the statutory claim limitation period including "... facilitating meaningful investigations regarding the conditions at the time of injury and allowing for quick repair so as to preclude other accidents ..."
>
> The Court further noted that the language of the statute, MCL 291.1404(1) is "... straightforward, clear, unambiguous, and not constitutionally suspect. Accordingly ... it must be enforced as written." *Rowland,* at 218, 731 N.W.2d 41.
>
> The word "exact" is not term of art and may be construed according to its dictionary definition. *Roberson Builders, Inc. v. Larson,* 482 Mich. 1138, 758 N.W.2d 284 (2008). According to the online Merriam-Webster Dictionary, http://merriam-webster.com/dictionary/exact (accessed July 15, 2009), the word "exact" is defined as: "exhibiting or marked by strict, particular, and complete accordance with act or a standard; marked by thorough consideration or minute measurement of small factual details."
>
> * * *
>
> Given the meaning, tone and the scope of the *Rowland* opinion, this court cannot but conclude that the description of the location set forth in plaintiff's NOI is technically insufficient and does not comply with the Supreme Court's interpretation and [sic] of MCL 391.1401(1) and the opinion's directions to the trial courts.

Plaintiff argues that the trial court erred by granting summary disposition in favor of defendant because the notice, taken as a whole, sufficiently informed defendant of the exact location of the defect that led to plaintiff's injury. The trial court's grant of defendant's motion for summary disposition under MCR 2.116(C)(7) is reviewed de novo. *Grimes v. Mich. Dep't of Transportation,* 475 Mich. 72, 76, 715 N.W.2d 275 (2006). "Under MCR 2.116(C)(7), summary disposition is proper when a claim is barred by immunity granted by law. To survive such a motion, the plaintiff must allege facts justifying the application of an exception to governmental immunity." *Fane v. Detroit Library Comm.,* 465 Mich. 68, 74, 631 N.W.2d 678 (2001) (citations omitted). "When reviewing a motion for summary disposition under MCR 2.116(C)(7), a court must accept as true the plaintiff's well-pleaded factual allegations and construe them in the plaintiff's favor. The court must look to the pleadings, affidavits, or other documentary evidence to determine whether there is a genuine issue of material fact." *Guerra v. Garratt,* 222 Mich.App. 285, 289, 564 N.W.2d 121 (1997) (citation omitted). Granting summary disposition is inappropriate "if a material factual dispute exists such that factual development could provide a basis for recovery[.]" *Id.* However, if there are no disputed material facts, "and reasonable minds could not differ on the legal effect of those facts, whether the plaintiff's claim is barred [by governmental immunity] is a question for the court as a matter of law." *Id.* Plaintiff bears the burden of proving the claimed exception to governmental immunity. *Michonski v. Detroit,* 162 Mich.App. 485, 490, 413 N.W.2d 438 (1987). Plaintiff may not merely rely on unsupported speculation or conjecture in opposing defendant's motion for summary disposition. *Karbel v. Comerica Bank,* 247 Mich.App. 90, 97, 635 N.W.2d 69 (2001). Issues of statutory interpretation are also reviewed de novo. *Id.*

***4** "The governmental tort liability act (GTLA) [MCL 691.1401, *et seq.*] broadly shields a governmental agency from tort liability 'if the governmental agency [1] is engaged in the exercise or discharge of a governmental function.' " *Grimes,* 475 Mich. at 76-77, 715 N.W.2d 275, quoting MCL 691.1407(1). The act provides several exceptions to governmental immunity, and this case concerns the highway exception. *Id.* at 77, 715 N.W.2d 275. This exception, set forth in MCL 691.1402(1), provides in part:

> [E]ach governmental agency having jurisdiction over a highway shall maintain the highway in reasonable repair so that it is reasonably safe and convenient for public travel. A person who sustains bodily injury or damage to his or her property by reason of failure of a governmental agency to keep a highway under its jurisdiction in reasonable repair and in a condition reasonably safe and fit for travel may recover the damages suffered by him or her from the governmental agency.

The Michigan Supreme Court ruled that "the immunity conferred upon governmental agencies is *broad,* and the statutory exceptions thereto are to be *narrowly* construed." *Nawrocki v. Macomb Co. Road Comm.,* 463 Mich. 143, 158, 615 N.W.2d 702 (2000). "Because [MCL 691.1402(1)] is a narrowly drawn exception to a broad grant of immunity, there must be strict compliance with the conditions and restrictions of the statute. Thus, we are compelled to strictly abide by these statutory conditions and restrictions in deciding" whether summary disposition was appropriate. *Id.* at 158-159, 615 N.W.2d 702 (citation omitted).

A plaintiff pursuing liability under the highway exception must follow the requirements set forth in MCL 691.1404(1), which necessitates that a claimant provide the governmental agency with notice of his or her claim:

> As a condition to any recovery for injuries sustained by reason of any defective highway, the injured person, within 120 days from the time the injury occurred, except as otherwise provided in subsection (3) shall serve a notice on the governmental agency of the occurrence of the injury and the defect. The notice shall specify the exact location and nature of the defect, the injury sustained and the names of the witnesses known at the time by the claimant.

Legislative acts requiring notice of defective highway conditions serve "(1) to provide the governmental agency with an opportunity to investigate the claim while it is still fresh and (2) to remedy the defect before other persons are injured." *Plunkett v. Dep't of Transportation,* 286 Mich.App. 168, 176-177, 779 N.W.2d 263 (2009). Additionally, in *Barribeau v. Detroit,* 147 Mich. 119, 125-126, 110 N.W. 512 (1907), the Supreme Court stated:

> The requirement that a notice be given is not alone for the purpose of affording the officers of the city opportunity for investigation. It is also for the purpose of confining the plaintiff to a particular "venue" of the injury. In determining the sufficiency of the notice, excepting perhaps as to the time of the injury, the whole notice and all of the facts stated therein may be used and be considered to determine whether it reasonably apprises the officer upon whom it is required to be served of the place and the cause of the alleged injury. The nature of the defect stated may aid in locating the place, and the place may be stated with such particularity that a very general statement of the defect (cause of the injury) may be aided. But to be legally sufficient, a notice must contain a description of the place of the accident so definite as to enable the interested parties to identify it from the notice itself....When parol evidence is required to determine both the place and the nature of the defect, a reasonable notice has not been given to the city. (Citations omitted.)

***5** The Supreme Court recently made clear that the plain language of MCL 691.1404 must be enforced, not rough approximations of its provisions. "MCL 691.1404 is straightforward, clear, unambiguous, and not constitutionally suspect. Accordingly, it must be enforced as written." *Rowland v. Washtenaw Co. Rd. Comm.,* 477

Mich. 197, 219, 731 N.W.2d 41 (2007). In arriving at this conclusion, the Court opined that, "inasmuch as the Legislature is not even required to provide a defective highway exception to governmental immunity, it surely has the authority to allow such suits only upon compliance with rational notice limits." *Id.* at 212, 731 N.W.2d 41. These pronouncements militate against liberally excusing notice failures. The Supreme Court specifically overruled *Hobbs v. Dep't of State Hwys,* 398 Mich. 90, 96, 247 N.W.2d 754 (1976), and *Brown v. Manistee Co. Rd. Comm.,* 452 Mich. 354, 356-357, 550 N.W.2d 215 (1996), which engrafted "an 'actual prejudice' requirement into the [notice] statute," requiring the governmental agency to demonstrate actual prejudice in order to bar a plaintiff's claim where the plaintiff's notice failed to comply with the notice requirements. *Id.* at 213-214, 550 N.W.2d 215.

In the present case, defendant maintained that plaintiff's notice, while timely filed, was deficient because it failed to specify the exact nature of the defect, location of the defect, and known witnesses.[2] The *Rowland* majority addressed the timeliness issue, but declined to address whether the plaintiff's notice was otherwise deficient based on its contents. *Id.* at 204 n. 5, 731 N.W.2d 41.

The primary goal when interpreting statutory language "is to discern the intent of the Legislature as expressed in the text of the statute. Where the language is clear and unambiguous, our inquiry ends and we apply the statute as written." *Grimes,* 475 Mich. at 76, 715 N.W.2d 275 (citations omitted). "[A] court may read nothing into an unambiguous statute that is not within the manifest intent of the Legislature as derived from the words of the statute itself." *Roberts v. Mecosta Co. Gen. Hosp.,* 466 Mich. 57, 63, 642 N.W.2d 663 (2002). Words and phrases are "construed and understood according to the common and approved usage of the language[.]" MCL 8.3a. "As far as possible, effect should be given to every phrase, clause, and word in the statute. The statutory language must be read and understood in its grammatical context, unless it is clear that something different was intended." *Sun Valley Foods Co. v. Ward,* 460 Mich. 230, 237, 596 N.W.2d 119 (1999) (citations omitted). When defining words in a statute, this Court must "consider both the plain meaning of the critical word or phrase as well as 'its placement and purpose in the statutory scheme.' " *Id.,* quoting *Bailey v. United States,* 516 U.S. 137, 145, 116 S.Ct. 501, 133 L.Ed.2d 472 (1995). "[A] provision of the law is ambiguous only if it 'irreconcilably conflict[s]' with another provision, [ ] or when it is *equally* susceptible to more than a single meaning." *Mayor of City of Lansing v. Mich. Pub. Service Comm.,* 470 Mich. 154, 166, 680 N.W.2d 840 (2004), quoting *Klapp v. United Ins. Group Agency,* 468 Mich. 459, 467, 663 N.W.2d 447 (2003). When a term is defined in the statute, that definition controls; undefined terms are given "their ordinary meanings[,]" and "[a] dictionary may be consulted if necessary." *Haynes v. Neshewat,* 477 Mich. 29, 36, 729 N.W.2d 488 (2007).

***6** MCL 691.1404(1) provides that "[a]s a condition to recovery ... the injured person ... shall serve a notice ... The notice shall specify the exact location and nature of the defect ..." The use of the word "shall" indicates that the requirements set forth are mandatory. *Walters v. Nadell,* 481 Mich. 377, 383, 751 N.W.2d 431 (2008) In *Rowland,* 477 Mich. at 217, 731 N.W.2d 41, the Court held that the statute was clear and unambiguous, and that it required "notice to be given as directed, and notice is adequate if it is served within 120 days and otherwise complies with the requirements of the statute, i.e., it specifies the exact location and nature of the defect, the injury sustained, and the names of the witnesses known at the time by the claimant, no matter how much prejudice is actually suffered." *Rowland,* 477 Mich. at 219, 731 N.W.2d 41.

In this case, plaintiff's description of the "exact nature" of the defect was "pavement defects." This description failed to describe a defect, other than a bare assertion that a defect existed. A description of a defect's "nature" would have to be more than simply calling it "a defect." The notice did not provide a description, size, or any other information to allow defendant to determine exactly what the pavement defects were. Similarly, plaintiff's description of the "exact location" of the defect was "eastbound I-94 exit ramp to 21 Mile Road in Macomb County." Testimony established that the exit ramp is one-quarter of a mile long. The notice did not contain any references to any specific defect in the one-quarter mile long exit ramp. Rather, the notice referred only to "pavement defects." Plaintiff's notice did not attach any of the photographs taken of the scene on the day of the accident. Although the notice mentions a police report with regard to potential witnesses to the accident, the report was not attached to the notice. Further, the notice did not refer to the report with regard to the location and nature of the defect. It is impossible to tell from the meager description where to begin looking, or to what claims plaintiff could be limited in subsequent

litigation. When viewed as a whole, it cannot reasonably be stated that plaintiff's notice complied with the content requirements of MCL 691 .1404(1). Indeed, at least with regard to the highway exception to governmental immunity, the *Rowland* Court has stated that there must be strict compliance with the conditions and restrictions of the statute. Since then, cases construing the highway exception have strictly adhered to the letter of the statute, and this Court remains bound by *Rowland's* insistence on strict compliance with the statutory requirements.

Affirmed.

All Citations

Not Reported in N.W.2d, 2010 WL 4673434

Footnotes

1 MCL 691.1401(d) defines "governmental agency" as "the state or a political subdivision."

2 The trial court's opinion concludes that plaintiff failed to provide notice of the exact location of the defect and, therefore, did not address the additional notice requirements.

End of Document

EXHIBIT 3

2011 WL 2555395
Only the Westlaw citation is currently available.

UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITING.

UNPUBLISHED
Court of Appeals of Michigan.

Vanessa MONTFORD, Plaintiff–Appellee,
v.
CITY OF DETROIT, Defendant–Appellant.

Docket No. 297074.
|
June 28, 2011.

Wayne Circuit Court; LC No. 09–016032–NO.

Before: BORRELLO, P.J., and JANSEN and SAAD, JJ.

Opinion

PER CURIAM.

***1** In this action involving the highway exception to government immunity, MCL 691.1402, defendant appeals the trial court's order that denied its motion for summary disposition. Defendant argues that plaintiff's claim is barred because she failed to accurately specify the location of the alleged sidewalk defect within 120 days of the incident, as required under the statute's notice provision, MCL 691.1404(1). For the reasons set forth below, we reverse.

I. FACTS AND PROCEDURAL HISTORY

Plaintiff's complaint alleged that, on or about December 28, 2008, she sustained injuries when she tripped and fell on a "dilapidated, cracked and raised section of" a sidewalk in Detroit. Plaintiff's attorney sent a letter dated January 15, 2009, to defendant's law department, which provided: "Please allow this correspondence to serve as notice pursuant to MCL 691.140[4] with reference to serious and permanent injuries suffered by my client...." The letter further stated that the incident occurred on an "unleveled, crumbling and broken concrete/asphalt/sidewalk in front of 14741 Kentfield Street." The attorney attached photographs showing the portion of sidewalk on which plaintiff tripped. The photographs were taken at close range, making it difficult to see the surrounding area.

After reviewing maps and records in an attempt to ascertain whether defendant has jurisdiction over the location, the principal construction inspector determined that 14741 Kentfield does not exist. He further testified, "I personally drove to Kentfield [S]treet and observed that there is no 14700 block of Kentfield Street and there are no addresses starting with 147xx on Kentfield [S]treet."

Defendant moved for summary disposition, arguing that plaintiff failed to provide an accurate address or location of the alleged defect in the notice as statutorily required. In her response, plaintiff explained that, when she received the motion, she realized there was a transposition of numbers in the address stated in her notice. She acknowledged that the incident took place in front of 14174 Kentfield, and not 14741 as indicated in the notice. Nonetheless, she argued that defendant received sufficient notice under MCL 691.1404 because the notice included photographs of the location where she tripped and fell. She also argued that, had defendant exercised due diligence in investigating her claim, it would have discovered the error in time to allow plaintiff to cure the defect within the statutory period. Ultimately, the trial court denied defendant's motion.

II. STANDARD OF REVIEW

This Court reviews de novo a trial court's decision on a motion for summary disposition. *O'Neal v. St. John Hosp. & Med. Ctr.*, 487 Mich. 485, 493; 791 NW2d 853 (2010). Defendant requested summary disposition pursuant to MCR 2.116(C)(7), (C)(8), and (C)(10). Because the trial court looked beyond the pleadings in reaching its decision, it appears the trial court relied on either MCR 2.116(C)(7) or (C)(10). *Capitol Properties Grp., LLC v. 1247 Center St., LLC*, 283 Mich.App 422, 425; 770 NW2d 105 (2009). [1] This appeal also involves the interpretation of MCL 691.1404. "We review de novo questions of statutory interpretation." *Oshtemo Charter Twp. v. Kalamazoo County Road Comm'n*, 288 Mich.App 296, 302; 792 NW2d 401 (2010).

III. ANALYSIS

***2** Defendant argues that it is immune from liability because plaintiff failed to provide the exact location of the defect pursuant to the 120–day notice requirement under MCL 691.1404.

Under the governmental tort liability act, MCL 691.1401 *et seq.*, a governmental agency engaged in the exercise or discharge of a governmental function is immune from tort liability unless one of the six statutory exceptions applies. *Wesche v. Mecosta Cty. Rd. Comm'n,* 480 Mich. 75, 83–84; 746 NW2d 847 (2008). The highway exception, MCL 691.1402(1), provides:

> [E]ach governmental agency having jurisdiction over a highway shall maintain the highway in reasonable repair so that it is reasonably safe and convenient for public travel. A person who sustains bodily injury or damage to his or her property by reason of failure of a governmental agency to keep a highway under its jurisdiction in reasonable repair and in a condition reasonably safe and fit for travel may recover the damages suffered by him or her from the government agency.

Defendant argues that the highway exception does not apply because plaintiff failed to provide adequate notice under MCL 691.1404(1), which provides:

> As a condition to any recovery for injuries sustained by reason of any defective highway, the injured person, within 120 days from the time the injury occurred ... shall serve a notice on the government agency of the occurrence of the injury and the defect. The notice shall specify the *exact location* and nature of the defect, the injury sustained and the names of the witnesses known at the time by the claimant. [Emphasis added.]

At issue is whether the notice provision demands strict compliance and whether constructive notice is sufficient. In denying defendant's motion for summary disposition, the trial court stated, "I think there was constructive notice. At least it identified a location and the specific sidewalk by the photographs. I think there was adequate notice for the city to investigate it." Thus, the trial court found constructive notice to be sufficient, and imposed a requirement that governmental agencies conduct timely investigations to determine the locations of highway defects even when the plaintiff fails to specify an accurate location. In addition, although not explicitly stated, it appears that the trial court read the statute to demand only substantial compliance.

If the language of a statute is clear and unambiguous, courts presume that the Legislature intended the meaning expressed in the statute, and judicial construction is neither required nor permitted. *Moore v. Secura Ins.*, 482 Mich. 507, 517; 759 NW2d 833 (2008). Courts of this state have historically "enforced government immunity mandatory notice provisions according to their plain language." *Rowland v. Washtenaw Cty. Rd. Comm'n,* 477 Mich. 197, 205; 731 NW2d 41 (2007). The enumerated exceptions to the government immunity statute "are to be narrowly construed." *Maskery v. Bd of Regents,* 468 Mich. 609, 614; 664 NW2d 165 (2003).

***3** The *Rowland* decision addressed "whether a notice provision applicable to the defective highway exception to governmental immunity, MCL 691.1404(1), should be enforced as written." *Rowland,* 477 Mich. at 200. In *Rowland,* the plaintiff served notice on the defendant 140 days after the incident. *Id.* at 201. The defendant argued that the plaintiff's failure to comply with MCL 691.1404(1), namely, the 120–day requirement, entitled it to judgment as a matter of law. *Id.* The Michigan Supreme Court agreed, holding that MCL 691.1404(1) demands strict compliance. *Id*. at 200. With this holding, the Court overruled *Brown v. Manistee Co. Rd. Comm,* 452 Mich. 354, 356–357; 550 NW2d 215 (1996), and *Hobbs v. Michigan State Highway Dep't,* 398 Mich. 90, 96; 247 NW2d 754 (1976), in which the Court held that, absent a showing of actual prejudice to the governmental agency, substantial compliance with the notice provision is sufficient. *Id.*

The *Rowland* Court opined that *Brown* and *Hobbs* were wrongly decided "because they were built on the argument that government immunity notice statutes are unconstitutional or at least sometimes unconstitutional if the government was not prejudiced." *Rowland,* 477 Mich. at 210. In rejecting *Brown* and *Hobbs,* the Court noted

that, as an economic and social piece of legislation, there need only be a rational basis for the notice provision to survive constitutional scrutiny. *Id.* at 210–211. The Court found several rational bases for the notice provision, including "facilitate[ing] investigation, claims resolution, and rapid road repairs, as well as [ ] creat [ing] reserves and the like for self-insured governmental entities." *Id.* at 215. The Court stated, "common sense counsels that inasmuch as the Legislature is not even required to provide a defective highway exception to government immunity, it surely has the authority to allow such suits only upon compliance with rational notice limits." *Id.* at 212. It further stated:

> In reading an "actual prejudice" requirement into the statute, this Court not only usurped the Legislature's power but simultaneously made legislative amendment to make what the Legislature wanted —a notice provision with no prejudice requirement— impossible.... Nothing can be saved from *Hobbs* and *Brown* because the analysis they employ is deeply flawed. [*Id.* at 213.]

Because the Court found MCL 691.1404 to be straightforward, clear, unambiguous, and constitutionally sound, it concluded that the statute must be enforced as written. *Rowland,* 477 Mich. at 219. Accordingly, the Court held that, "the statute requires notice be given as directed, and notice is adequate if it is served within 120 days and otherwise complies with the requirements of the statute, i.e., it specifies the exact location and nature of the defect, the injury sustained, and the names of the witnesses known at the time by the claimant, no matter how much prejudice is *actually suffered.*" *Id.* (emphasis in original).

***4** In a recent order, our Supreme Court addressed an issue identical to the one here. In *Jakupovic v. Hamtramck,* — Mich. —; — NW2d — (Docket No. 142436, issued June 1, 2011), the Supreme Court reversed this Court's decision and remanded the case for the trial court to grant summary disposition to the city of *Hamtramck.* The Supreme Court reasoned as follows:

> The Court of Appeals recognized that the plaintiff had stated the wrong address in giving notice to the defendant of an alleged defect in a sidewalk. The Court of Appeals erred by excusing this error, rather than enforcing the notice requirement found at MCL 692 .1404(1) as written. *Rowland v. Washtenaw Co. Rd. Comm.,* 477 Mich. 197, 219 (2007). The statute requires notice of "the exact location" of the defect, and in this case, the plaintiff failed to specify the correct address where the defect was allegedly located.

A Supreme Court order constitutes binding precedent when the rationale the Court employed can be understood. *Evans & Luptak, PLC v. Lizza,* 251 Mich.App 187, 196; 650 NW2d 364 (2002). The Supreme Court's rationale in *Jakupovic* is clear: If a plaintiff gives an incorrect address in her notice, she fails to give the "exact location" of the defect as required by MCL 692.1404(1), and this is fatal to her claim.

In accordance with *Jakupovic* and *Rowland,* we reject the argument that plaintiff need only substantially comply with the notice provision absent prejudice to defendant. The notice must "specif[y] the exact location ... of the defect...." MCL 691.1404(1). This language is clear and unambiguous. The inclusion of the term "exact" before "location" negates the possibility that the Legislature intended erroneous, or even approximate, locations to suffice. Here, as in *Jakupovic* and *Rowland,* plaintiff's undisputed failure to strictly comply with the notice provision bars her claim.

As our Supreme Court has done in both *Jakupovic* and *Rowland,* we also reject the notion that constructive notice satisfies the statute. Here, although the term "notice" is unmodified in MCL 691.1404(1), the term "specify" in the second sentence indicates that actual, rather than constructive, notice is required. Further, reading the statute to contemplate constructive notice would nullify the term "specify." Thus, the notice provision clearly and unambiguously requires actual notice. Accordingly, the trial court erred in denying defendant's motion on the ground that defendant received constructive notice by virtue of the photographs. [2]

Finally, we observe that the trial court's flagrant attempt to rewrite the statute to impose an obligation on governmental agencies to investigate claims when they have not received a valid notice was entirely outside the trial court's authority. Unless a plaintiff satisfies the statutory notice provision, she is barred from recovery, and the governmental agency is immune from liability. Here, under either MCR 2.116(C)(7) or (C)(10), defendant is entitled to judgment as a matter of law.

***5** Reversed.

All Citations

Not Reported in N.W.2d, 2011 WL 2555395

Footnotes

1 Summary disposition under MCR 2.116(C)(7) is appropriate when, viewing the evidence in the light most favorable to the nonmoving party, the moving party has shown that the plaintiff's claim is "barred because of ... immunity granted by law...." *Odom v. Wayne County,* 482 Mich. 459, 466; 760 NW2d 217 (2008). The moving party may present affidavits, depositions, admissions, or other documentary evidence in support of its motion, and the contents of the complaint are accepted as true unless contrary evidence is provided. *Id.* Under MCR 2.116(C)(10), summary disposition is proper when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Rose v. Nat'l Auction Group, Inc.,* 466 Mich. 453, 461; 646 NW2d 455 (2002). In reviewing the trial court's decision, this Court "consider[s] the affidavits, pleadings, depositions, admissions, and other documentary evidence submitted by the parties in the light most favorable to the party opposing the motion." *Id.*

2 Constructive notice is clearly inadequate under the statute. However, we also note that the close-up photographs of the sidewalk fail to show any part of the surrounding area that would allow the city to discern the sidewalk's location. Indeed, it is impossible to differentiate the photographed portion of sidewalk from any dilapidated urban sidewalk, so plaintiff's evidence would even fail to meet this invalid standard.

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